Petition

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81-1072

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES W. HARPER,

Petitioner,

v.

BARNES GROUP, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Former Fifth Circuit)

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QUESTION PRESENTED

Did the Fifth Circuit violate the mandate of *Erie* when it upheld a restrictive employment covenant containing no territorial limitation as required by state common law and public policy?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES W. HARPER,

Petitioner,

v.

BARNES GROUP, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Former Fifth Circuit)

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit (former Fifth Circuit) entered in the above case on August 10, 1981.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals was entered on August 10, 1981, and is printed in Appendix "A" hereto, *infra*, pp. 1a-11a. The Judgment of the Court of Appeals was entered on August 10, 1981, and is printed in

Appendix "B" hereto, *infra*, pp. 12a-13a. Rehearing was denied on September 11, 1981, and notice of the order is printed in Appendix "C" hereto, *infra*, pp. 14a-15a. The District Court for the Southern District of Georgia entered its original order on September 9, 1980, and is printed in Appendix "D" hereto, *infra*, pp. 16a-23a. The District Court order on reconsideration was entered October 15, 1980 and is printed in Appendix "E" hereto, *infra*, pp. 24a-31a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner entered into an employment contract with Respondent in July, 1968 whereby he was to engage in selling Respondent's line of products (some 12,000+ items) in a sixteen-county area in southeastern Georgia. Paragraph 6 of the contract contained a covenant not to compete whereby Petitioner agreed not to sell any products of the same or similar kind as sold by the employer to customers to whom Petitioner had made sales of company products within the last two years of his employment. Petitioner ceased working for Respondent in early June, 1980 and went into business in competition with Respondent.

At an initial hearing held August 20, 1980 on Respondent's motion for a preliminary injunction in this diversity case, the District Court granted a temporary restraining order. After a subsequent hearing on August 28, 1980 and review of authorities, the District Court held that the covenant was void and unenforceable because it did not contain an explicit territorial limitation in the covenant. (Appendix "D.") The Court dissolved the temporary restraining order, and there-

after upon Respondent's motion for reconsideration, reaffirmed its decision that the covenant was invalid under Georgia law. (Appendix "E.")

Based on a "rule of reason" the Fifth Circuit Court of Appeals reversed. 653 F.2d 175 (1981). (Appendix "A," *infra*, pp. 1a–11a.) Petitioner sought a panel rehearing premised on *Guffey v. Shelnut & Associates*, 247 Ga. 667, 278 S.E.2d 371 (1981), which requires an express territorial limitation in the covenant itself. The pertinent parts of the *Guffey* contract being construed are attached as Appendix "F." *Guffey* had not been reported as of the date Petitioner briefed and argued to the Fifth Circuit Court, and was not printed in the advance sheets until August 13, 1981. The petition for rehearing to the Fifth Circuit was nevertheless denied without opinion on September 11, 1981.

On October 15, 1981, *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 658 F.2d 1098 (5th Cir. 1981) was decided, which correctly rejected the "rule of reason" applied in *Harper* in favor of a strict territorial limitation test in accordance with *Guffey* and the decision of the District Court in *Harper*. Petitioner now seeks certiorari for the Fifth Circuit opinion and for its failure to grant a rehearing.

REASONS FOR GRANT OF WRIT

Because of the conflict between *Barnes Group, Inc. v. Harper*, 653 F.2d 175 (5th Cir. 1981), attached hereto as Appendix "A," and Georgia law (particularly *Guffey v. Shelnut & Associates*, 247 Ga. 667, 278 S.E.2d 371 (1981)), and between *Harper* and *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 658 F.2d 1098 (5th Cir. 1981), Petitioner seeks certiorari under Rule 17(1)(a). The Fifth Circuit has decided an important state question

touching on public policy grounded in the State Constitution in conflict with applicable state law. Failure to review this decision will permit a circuit court to disregard its obligation under *Erie* by substituting its analysis and result contrary to a specific new Georgia Supreme Court decision.

The enforceability of non-competition covenants presents a delicate issue since they are in partial restraint of trade and are contrary to public policy if they lessen competition. Georgia Constitution, Ga. Code § 2-2701; Ga. Code § 20-504; *Fuller v. Kolb*, 238 Ga. 602, 603, 234 S.E.2d 517 (1977). The Georgia courts are reluctant to enforce a restrictive covenant and have clearly expressed that reluctance. *Richard P. Rita Personnel Services International, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79 (1972); *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735 (1898). A court cannot add to, delete from or revise the covenant while professing to construe it. *Adcock v. Speir Insurance Agency*, 158 Ga. App. 317, 319, 279 S.E.2d 759 (1981).

With all respect to the Circuit Court, it has patently disregarded the clear rule of Georgia law on the specific issue before it, that being whether an *explicit* territorial limitation must be included or explicitly incorporated by reference in a covenant as a condition for validity.

Guffey v. Shelnut was decided May 26, 1981, and it is the controlling decision of the highest Georgia court. The *Guffey* contract provided in Section Three under the heading "Territory" the following: "The territory within which Manager [Guffey] shall operate is North Carolina, and such other territory as approved by Company." Section 19 contained the restrictive covenant, which did not refer to any territory either directly or indirectly by incorporation. (*See* Section Nineteen,

Appendix "F.") The Supreme Court of Georgia was explicitly clear that the territorial limitation must be contained *in the covenant itself.* 247 Ga. at 670. The Court observed that no territory was described in the covenant and invalidated it for that reason.[1]

In the case before this Court there is neither a territorial limitation in the covenant, nor a reference to a territorial description incorporated into the covenant. Moreover, *Harper*'s covenant stated "it shall be construed as independent of any other provision in this agreement . . . ." The *Guffey* rule must therefore be applied to strike down *Harper*'s covenant.

In *Merrill Lynch, Pierce, Fenner & Smith v. Stidham, supra,* argued the day after the case now before this court, the same panel of Fifth Circuit judges flatly rejected a "reasonableness" test in favor of the express geographical limitation test of *Guffey. Stidham* held that "reasonableness is the *purported* touchstone of this analysis under the Georgia authorities . . . [but] this standard has been rendered hollow and meaningless . . . ." (Emphasis in original.) *Id.* at 1101. *Stidham* further recognized that the analysis of the geographical limitation is "*without reference to the overall reasonableness*" of the profession involved. *Id.* Finally, *Stidham* correctly cited *Guffey v. Shelnut & Associates* for the proposition that the covenant itself must specify the foreclosed territory. 247 Ga. at 670.

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[1]The only Georgia case close to the issue which could support Respondent is *Marcoin, Inc. v. Waldron,* 244 Ga. 169, 259 S.E.2d 433 (1979). In that case the restrictive covenant referred to the "aforesaid territory" which was described at the beginning of the agreement. Thus, it could be said that there was an incorporation by reference of the territory into Marcoin's covenant.

Barnes Group, Inc. v. Harper (Appendix "A") applied the "reasonableness" test rejected by *Guffey* and *Stidham*, and upheld *Harper*'s restrictive covenant. First, the court concluded that "these covenants . . . must be reasonable, not perfect, given the surrounding facts." 653 F.2d at 179 (p. 8a of Appendix "A"). Second, the panel observed that "a rule of reason—not of per se applicability—has obtained." Finally, a case was cited in which the Georgia Supreme Court *first* decided that the covenant was sufficiently geographically limited, and *then* the court held that " 'the interests of the state [are] better served by judging the reasonableness of a territorial restraint' on a case-by-case basis." *See Barry v. Stanco Communications Products, Inc.*, 243 Ga. 68, 71, 252 S.E.2d 491, 494 (1979). There is no question that under Georgia law, as repeated in numerous state decisions, as well as in *Stidham*, the reasonableness test is only the third and last of a time, territory and reasonableness test, as illustrated by *Guffey*, not a complete test in itself. *Stidham*, which followed *Guffey* and struck down the covenant for lack of an express territorial description, and *Harper* which upheld a covenant without an express territorial limit because it was "reasonable," cannot be reconciled. More importantly, *Harper* sharply conflicts with *Guffey*.

CONCLUSION

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 83 L.Ed. 1188 (1938), requires strict conformity to statutory and local law by federal courts in substantive matters. 1A Moore's Federal Practice (2d Ed.) ¶ 0.310. The Respondent was entitled only to "another tribunal, not another body of law." *Guaranty Trust Co. v. York*, 326 U.S. 99, 102, 65 S.Ct. 1464, 89 L.Ed. 2079, 2082

(1945). The Fifth Circuit Court has a duty to apply state law "in accordance with the then controlling decision of the highest state court." *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 85 L.Ed. 327, 330 (1941). The *Guffey v. Shelnut & Associates* case is the controlling decision of the Georgia Supreme Court, but the Fifth Circuit failed to follow it in *Harper.*

Because the Petitioner is entitled to the substantially same result in a federal court as if the case were tried in a State court, 1A Moore's Federal Practice (2d Ed.) ¶ 0.317[1], he respectfully requests this Court to grant certiorari for the purpose of reversing the Fifth Circuit decision in *Barnes Group, Inc. v. Harper.* Alternatively, Petitioner respectfully requests that this case be remanded to the Fifth Circuit for the express purpose of certifying the question addressed in this petition to the Georgia Supreme Court pursuant to Ga. Code § 24-4536, and as observed as an appropriate procedure in footnote No. 7 of *Stidham.*

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, August 10, 1981

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Unit B

August 10, 1981

No. 80-7917

BARNES GROUP, INC.,
Plaintiff-Appellant,

v.

JAMES W. HARPER,
Defendant-Appellee.

James M. Thomas, Savannah, Ga., for plaintiff-appellant.

Arnold C. Young, Ralph O. Bowden, III, Savannah, Ga., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before HILL, FAY and HENDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Appellant Barnes Group, Incorporated [Barnes] brought suit against its former salesman, appellee James

W. Harper, alleging breach of a restrictive covenant contained in Harper's employment contract. The district court has determined that the covenant is void under controlling state law and has denied Barnes' prayer for injunctive relief. We reverse and remand.

I.

The facts are not in significant dispute. Harper commenced employment with a division of Barnes, a Delaware corporation with principal offices in Connecticut, in August 1968 as a commissioned sales agent. The division that employed Harper was engaged in the nationwide marketing of some 12,000 items including screws, nuts, bolts, automobile replacement parts and the like. This line of business is highly competitive, in part owing to the lack of product differentiation. Accordingly, the contact between salesman and customer with resulting good will, is absolutely critical to business success. Indeed, the Barnes' division in which Harper worked maintained no house contacts, transacted no catalogue sales, and looked to its salesmen as its sole customer contact. Barnes without question invested some time in training Harper to work the sales territory assigned to him, althoughthe exact nature and value of this training is the subject of differing testimonial accounts.[1]

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[1] Barnes, for example, points to evidence of several weeks of fairly intensive training of Harper to accede to the sales territory. The training included introducing Harper to past customers, evening instruction, and a study of the division's special sales technique. Harper minimizes all of this. He did not recall any introduction to Barnes' customers and, in fact, characterized his sales territory as "absolute dead, cold territory" when he first took the position.

The terms of Harper's employment by Barnes were to be governed by an employment contract entitled "Salesman's Agreement." Of particular concern here are two paragraphs of the contract:

1. *Territory*

The Company hereby appoints the Salesman the Company's sales representative in its Territory No. *196-4.* Said territory consists of certain specific or generally described accounts, which are hereby assigned to the Salesman, located in a defined geographical area. Said accounts are set forth or described in a certain document on file in the Company's office, called "Territory Description," bearing the Salesman's name and territory number. Said Territory Description contains also a list of or description of accounts, if any, which, although within the aforesaid geographical area, are excluded from the Salesman's territory. The accounts which are included in the Salesman's territory are hereinafter referred to as "territory." If said Territory Description shall include any general classification(s) of accounts declared to be "Open to all salesmen", the accounts within such classification(s) shall not be included in the Salesman's territory unless and until so included by supplemental agreement. The aforesaid Territory Description is now in existence and is incorporated herein by reference and is hereby made a part of this agreement to the same extent as if fully rewritten herein. A copy of said Territory Description has been delivered to the Salesman who hereby acknowledges its receipt.

* * *

6. *Restrictive Covenant*

The salesman agrees that (1) if he shall voluntarily leave the Company's employ hereunder, or (2) if he shall be discharged by the Company for

just cause, he will not, for a period of two (2) years thereafter, sell or attempt to sell any products of the same or similar kind as those sold by the Company, to any of the customers to whom he made one or more sales for the Company within the last two years of his employment. The Salesman agrees that his promise herein made so to refrain from selling or attempting to sell means that he will not, directly or indirectly, either as an individual on his own account or as a partner, employee, agent or salesman of or for any person, firm, association or corporation, or as an officer, director or stockholder of any closely-held corporation as hereinafter defined, engage in selling or attempting to sell any of said products to any of the customers hereinabove designated. This covenant shall not be deemed violated by the Salesman's engaging in the business of a manufacturer or retailer of said products, but it shall be deemed violated by any sale of said products to any of said customers by the Salesman in or for a business combining retail and wholesale sales if the wholesaling is a substantial part of such combined business. For the purposes of this covenant automobile manufacturers and their franchised new-car dealers shall not be considered to be in the business of wholesaling.

The term "closely-held corporation", as used herein, shall be any corporation in which the Salesman or his wife, child or parent owns, directly or indirectly, more than ten per cent (10%) in value of the outstanding stock, or a corporation in whose management the Salesman is an active participant.

This covenant on the part of the Salesman is of the essence of this agreement; it shall be construed as independent of any other provision in this agreement, and the existence of any claim or cause of action of the Salesman against the Company,

> whether predicated on this agreement or otherwise, shall not constitute a defense to the enforcement by the Company of this covenant. . . .

Plaintiff's Complaint, Vol. I, at 1 (Exhibit A). The "Territory Description," referred to in paragraph 1 of the contract, listed the 16 counties[2] in southeastern Georgia to which Harper was assigned.

Harper's success was significant. His sales volume by 1977 had reached $170,000. Two years later his volume had surpassed $220,000 and his net commission had reached nearly $46,000. But in June 1980 Harper resigned his position and opened a business called Harper Distributing Company. He then began selling to his customers some of the same products he had sold to them as a Barnes salesman within the prior two years. Since Harper left the employ of Barnes, the latter has suffered a dramatic sales decline in what formerly was Harper's sales territory: monthly volume dropped to approximately six percent of its former average.

II.

Barnes brought this action, invoking the diversity jurisdiction, 28 U.S.C. § 1332(a) (1976), of the United States District Court, Southern District of Georgia, to pray for specific performance of the contractual covenant at issue and to demand certain legal relief. The court held a hearing and on August 20, 1980, entered a temporary restraining order to enjoin Harper's sale of products when such sale would contravene the terms of the restrictive covenant. Following a second hearing held

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[2]Appling, Bryan, Bulloch, Candler, Chatham, Effingham, Evans, Glynn, Jenkins, Liberty, Long, McIntosh, Screven, Tattnall, Toombs, and Wayne counties were listed.

on August 28, 1980, the district court dissolved the temporary restraining order and denied the motion for preliminary injunctive relief.

The district court based its action upon a view that the territorial limitation included in Harper's employment contract is, as a matter of Georgia law, unreasonable. From that order, and from the denial of its motion for reconsideration, *see* Fed. R. Civ. P. 59, Barnes has appealed to this Court.

III.

The district court held the restrictive covenant at issue "fatally defective" because it failed to include an "explicit" territorial description. The court rejected Barnes' contention that paragraph 1 of the contract, quoted *supra*, which identified Harper's territory as "196-4" and which incorporated the "Territory Description" by reference,[3] was sufficiently explicit under Georgia law.[4] A factor that weighed heavily in the court's analysis on this score was the language in paragraph 6 stating that the covenant "shall be construed as independent of any other provision in this agreement . . . ." That, in the court's eyes, militated against reading paragraphs 1 and 6 together. Similarly, the

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[3]The Record does, in fact, contain a document entitled "Territory Description," Plaintiff's Complaint, Vol. I, at 1 (Exhibit B), and a boilerplate acknowledgment of its receipt.

[4]Although paragraph 8 of the employment contract states that it "shall be construed in accordance with the laws of the State of Ohio," Georgia law holds that restrictive covenants, which contravene the public policy of the State, are construed under Georgia law if they are to be applied in Georgia. *Casco, Inc. v. Gimbert*, 239 Ga. 675, 228 S.E.2d 368 (1977).

district court rejected the argument that the limitation, in practical effect, was extremely tailored in its territorial aspect since it only embraced actual customers of Barnes serviced by Harper within two years of his resignation. To sustain such an argument, the court held, would require it to imply the territorial reach of the covenant. Finally, the district court termed the 16-county restriction "clearly overbroad" inasmuch as that territory including several counties in which Harper did no business. We have determined that the district court, in ruling as indicated above, has misapplied controlling authority. We turn now to explain our reasons for so holding.

IV.

We are bound to apply Georgia law in this case, *see* note 4 *supra*, since the basis for federal jurisdiction is diversity of citizenship. *See Green v. Edmands Co.*, 639 F.2d 286, 289 (5th Cir. 1981). A "trend" in the area of restrictive covenants is somewhat difficult to divine in Georgia in light of a high precedential mortality rate. *See e.g., Barry v. Stanco Communications Products, Inc.*, 243 Ga. 68, 252 S.E.2d 491 (1979), *overruling in part, Taylor Publishing Company v. Jones*, 226 Ga. 832, 177 S.E.2d 655 (1970); *Artistic Ornamental Iron Co. v. Wilkes*, 213 Ga. 654, 100 S.E.2d 731 (1957); *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949); *Fuller v. Kolb*, 238 Ga. 602, 234 S.E.2d 517 (1977), *overruling in part, Kirshbaum v. Jones*, 206 Ga. 192, 56 S.E.2d 484 (1949). Clearly and consistently resounding from the relevant case law, however, is the principle that restrictive covenants "ancillary" to employment contracts are in "partial restraint of trade"[5] and are thus sustained only "if

[5] *Cf.* Georgia Const., Art. III, sec. 8, par. 8; Georgia Code Ann. § 20-504.

strictly limited in time and territorial effect and otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee." *Purcell v. Joyner,* 231 Ga. 85, 86, 200 S.E.2d 363, 365 (1973). *See also Marcoin, Inc. v. Waldron,* 244 Ga. 169, 259 S.E.2d 432, 433 (1979); *Fuller v. Kolb, supra*; *Howard Schultz & Associates, Inc. v. Broniec,* 239 Ga. 181, 236 S.E.2d 265 (1977). These covenants, then, must be reasonable, not perfect, given the surrounding facts. *See Edwards v. Howe Richardson Scale Co.,* 237 Ga. 818, 820, 229 S.E.2d 651, 653 (1976) ("Although Howe has not shown that it is doing business everywhere within a fifty mile radius of Albany, Georgia, we think it has shown substantial contracts in the territory generally, and that, under the circumstances of this case, the restraint imposed is reasonably required to protect the interests of the employer.").

The tendency of many drafters, which the courts earnestly have sought to change, has been to prepare restrictive covenants laden with geographic overkill. But even in the face of such covenants, *e.g., Howard Schultz & Associates v. Broniec,* 239 Ga. 181, 186, 236 S.E.2d 265, 269 (1977), a rule of reason—not of per se applicability—has obtained.[6] *See Barry v. Stanco Communications Products, Inc., supra,* 243 Ga. at 71, 252 S.E.2d at 494 (overruling cases "to the extent that they hold a covenant not to compete which applies to the whole state is always void and will never be enforced"). The Supreme Court of Georgia has stated in unequivocal terms that "the interests of the state [are] better served

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[6]This is not true of a covenant that is wholly without territorial limitation. Such a covenant *is* per se unreasonable. *Guffey v. Shelnut & Assoc., Inc.,* ___ Ga. ___, 278 S.E.2d 371 (1981).

by judging the reasonableness of a territorial restraint" on a case-by-case basis. *Id.* at 71, 252 S.E.2d at 494.

Several decisions aid our study of the particular covenant involved here. In *Barry v. Stanco Communications Products, Inc., supra,* the Georgia court held that "restrictions . . . which relate to the territory in which the employee was employed are generally upheld." *Id.* at 70, 252 S.E.2d at 493. Earlier, in *Howard Schultz & Associates, supra,* the court had explained the logic behind this:

> [T]he justification for this difference in treatment is that a court will accept as prima facie valid a covenant related to the territory where the employee was employed as a legitimate protection of the employer's investment in customer relations and good will. Thus a court will enforce an agreement prohibiting an employee from pirating his former employer's customers served by the employee, during the employment, at the employer's direct or indirect expense.

239 Ga. at 183-84, 236 S.E.2d at 268. We think this language is directly applicable to the facts at hand. It is true that the actual territory covered by the covenant—the 16 counties—was incorporated by reference[7] into the employment contract. The evidence before the district court, it is also true, showed that Harper only serviced customers in 14 of the 16 counties in the two years immediately prior to his resignation. But the territory, referred to by number in paragraph 1 of the contract, is

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[7]This case does not confront the Court with any questions concerning the incorporation by reference. Thus, the problem in *Colonial Life & Acc. Ins. Co. v. Byrd,* 227 Ga. 198, 179 S.E.2d 746 (1971), where the employer argued that an employee "manual" that permitted an employee to sell anywhere in the State sufficiently defined the territory, is not present here.

clearly the geographic reference point for the terms of the covenant contained in paragraph 6.[8] Moreover, the covenant makes absolutely no attempt to prevent a former employee from selling his wares in any of the subject counties. Rather, the covenant prevents the former employee "from pirating his former employer's customers served by the employee, during the employment," 239 Ga. at 184, 236 S.E.2d at 268. To be sure, this restraint is no "larger or more stringent than necessary for the protection of the employer." *Purcell v. Joyner, supra,* 231 Ga. at 87, 200 S.E.2d at 365, for it only prevents Harper from soliciting these companies with whom he transacted business at Barnes' "direct or indirect expense," 239 Ga. at 186, 236 S.E.2d at 268.

Several obvious ills inhere in restrictive covenants which either have no territorial limitation, or have a limitation that is overbroad or vague. Such covenants, as indicated above, tend to shackle a former employee to an extent far greater than the covenantee's needs dictate. An employer's superior position—in the absence of proper tailoring and true need—cannot be sustained under the law of Georgia. A further problem associated with overbroad or nonexistent territorial limitations "is [lack] of notice to the former employee." *Fuller v. Kolb, supra,* 238 Ga. at 604, 234 S.E.2d at 518. But having recognized these potential shortcomings in restrictive covenants, we find no such problems in the one at hand.

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[8]The district court was troubled by language in the contract calling for the covenant to be construed "as independent of any other [contractual] provision." We are not. The point of such a clause, no doubt, was to ensure that the employer would not be held to have waived any objection to breach of the restrictive covenant by its failure to fire the employee and declare him in breach on account of any technical breach that employee might have committed during his service.

Barnes' interests were adequately protected—not over-protected—by the territorial restriction before us. And it is inconceivable that a covenant so explicit as this one could have confronted Harper with any "notice" problems cognizable by the courts. *Cf. Marcoin, Inc. v. Waldron, supra.*

V.

We, then, reverse the order of the district court and remand the case for proceedings consistent with our opinion. We do not, however, order the district court to enter the relief sought by Barnes. Such relief should only be granted following full consideration by the district court of all equitable claims and defenses of the parties.

REVERSED and REMANDED.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
August 10, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7917

D.C. Docket No. CV 480-232

BARNES GROUP, INC.,
Plaintiff-Appellant,

v.

JAMES W. HARPER,
Defendand-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Before HILL, FAY and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is

hereby reversed; and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the appellee pay to the appellant the costs on appeal, to be taxed by the Clerk of this Court.

August 10, 1981

ISSUED AS MANDATE: September 23, 1981

APPENDIX C

PETITION FOR REHEARING DENIED
September 11, 1981

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Unit B

No. 80-7917

[Filed: September 11, 1981]

BARNES GROUP, INC.,
Plaintiff-Appellant,

v.

JAMES W. HARPER,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

ON PETITION FOR REHEARING
(September 11, 1981)

Before HILL, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States District Judge

APPENDIX D

ORDER OF THE DISTRICT COURT SOUTHERN DISTRICT OF GEORGIA September 9, 1980

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
Savannah Division

No. CV480-232

[Filed: September 9, 1980]

BARNES GROUP, INC.,
Plaintiff,

v.

JAMES W. HARPER,
Defendant.

ORDER

Before the Court in this diversity case is plaintiff's motion for a preliminary injunction to continue the effect of a temporary restraining order granted by this Court on August 20, 1980, after an initial hearing. In that Order, the Court enjoined the defendant, James W. Harper, from selling or attempting to sell any products of the same or similar kind as those sold by plaintiff to any customer to whom defendant had made one or more sales for plaintiff within the two years prior to the defendant's ceasing employment with the plaintiff

June 11, 1980. The Court thus gave temporary effect to the restrictive covenant contained in a contract of employment entered into by the parties.

At the initial hearing, the defendant adduced no evidence. Counsel indicated that he was unprepared, having been served with notice only the afternoon before the proceeding. Plaintiff established a prima facie case, and the temporary restraining order was granted pending a hearing on the present motion, which was scheduled August 28, 1980.

After this second hearing and a thorough review of the relevant authorities, it is the determination of this Court that the covenant sued under is void and unenforceable under Georgia law. Therefore, plaintiff's motion for preliminary injunction must be denied, and the restraining order now in force dissolved.

Background

The plaintiff in this action, Barnes Group, Inc., is a Delaware corporation, with principal offices in Bristol, Connecticut. Bowman Distribution is a division of the plaintiff company which sells a wide variety of nuts, bolts, fasteners, and other items for use in the auto parts industry. The defendant, James W. Harper, began working for Bowman in July, 1968, as a salesman assigned to commercial and other customers in a sixteen-county area in southeastern Georgia.[1] The nature of this territory is a subject of dispute between the parties. Plaintiff's memorandum of September 3, 1980, alleges

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[1]The counties included in this territory were as follows: Appling, Bryan, Bulloch, Candler, Chatham, Effingham, Evans, Glynn, Jenkins, Liberty, Long, McIntosh, Screven, Tattnall, Toombs, and Wayne.

that Mr. Harper was assigned accounts already established by Bowman when he came to the position. Defendant, however, testified at a hearing held August 28, 1980, relating to the motion presently before the Court that the area was "dead, cold territory when I got it." Nonetheless, it is agreed that Mr. Harper enjoyed considerable success with Bowman. His gross sales in the last calendar year totalled over $220,000, with commission earned in excess of $40,000. It is also undisputed that the large majority of these sales were made in Chatham County, and that the defendant neither made nor attempted to make sales in many of the counties nominally within his territory. Furthermore, it is undisputed that since Mr. Harper's departure, Bowman sales in this area have declined from about $18,000 per month to less than $1,000 per month. It is also clear that a very significant factor in this sales decline has been the competition new Bowman sales personnel have faced from a supply business established by Mr. Harper subsequent to leaving the plaintiff company. In testimony received at the August 28, 1980 hearing, the defendant indicated that all but a handful of his sales in the new business had been to customers he had formally served while working for the plaintiff.

In this action Bowman alleges, and the evidence thus far adduced tends to show, that Mr. Harper was provided with numerous aides and benefits during the term of his employment. He was instructed in sales methods and techniques. Periodic meetings were held to acquaint him with new products, as well as recognize his sales achievements. Regional managers visited his office to assist in organizing his sales efforts and otherwise promote the growth of his accounts. Catalogues, brochures, picture books, technical bulletins, merchandise samples, and the like were routinely provided. Bowman

thus contends that the goodwill which the defendant developed and upon which his present business chiefly relies was created in significant part through opportunities provided by it at its expense. Bowman argues further that because its area of commerce is highly competitive and the products it sells are not unique, customer loyalty is focused, not on the company, but on the individual sales agent. Therefore, plaintiff contends that it has a valid business interest which can only be protected by recourse to the restrictive covenant in the sale agreement entered into by the parties. This covenant provides in pertinent part as follows:

> The salesman agrees that (1) if he shall voluntarily leave the Company's employ hereunder, or (2) if he shall be discharged by the Company for just cause, he will not, for a period of two (2) years thereafter, sell or attempt to sell any products of the same or similar kind as those sold by the Company, to any of the customers to whom he made one or more sales for the Company within the last two years of his employment. The Salesman agrees that his promise herein made so to refrain from selling or attempting to sell means that he will not, directly or indirectly, either as an individual on his own account or as a partner, employee, agent or salesman of or for any person, firm, association or corporation, or as an officer, director or stockholder of any closely-held corporation as hereinafter defined, engage in selling or attempting to sell any of said products to any of the customers hereinabove designated.

Analysis

In the present case, this Court has entertained oral argument and testimony at two hearings, first with reference to the temporary restraining order which

was issued and, more recently, with respect to the preliminary restraining order here under consideration. Numerous memoranda and other correspondence have also been received from both sides. Based upon these sources, it seems certain that the defendant has violated the terms of the covenant here sued under. Mr. Harper's own statement that his business now consists chiefly of former Bowman customers and Bowman-type products leaves little doubt that he does in fact "sell or attempt to sell . . . products of the same or similar kind as those sold by the Company." Therefore, plaintiff would seem entitled to the relief prayed for *if* this restrictive covenant is enforceable under Georgia law.[2]

In Georgia, contacts which tend to lessen competition or which are in restraint of trade are against public policy and are void. Georgia Code Ann. § 20-504 (1977 Rev.). Restrictive covenants are enforceable "only if strictly limited in time and territorial effect and [are] otherwise reasonable considered the business interests of the employer sought to be protected and the effect on the employee." *Orkin Exterminating Co. v. Pelfney*, 237 Ga. 284, 285 (1976). See also *McNease v. National Motor Club of America*, 238 Ga. 53 (1976). Such covenants are looked upon with disfavor because they tend to deprive the individual employee of the capacity to use his skills, which threatens his ability to support himself

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[2]The sales agreement under which suit is brought here provides that it is to be construed in accordance with the laws of the State of Ohio. However, Georgia case law holds that since restrictive covenants are in contravention of the public policy of the State, they must be construed under Georgia law if they are to be applied in Georgia. *Nasco, Inc. v. Gimbert*, 239 Ga. 676 (1977). Thus, at the August 28, 1980 hearing, counsel for both sides stipulated that the present action should be adjudicated under Georgia law.

and the public's interest in spirited competition in the marketplace. *Farmer v. Airco,* 231 Ga. 847 (1974).

In reviewing restrictive covenants, Georgia courts have considered three types of requirements. For enforcement to be permitted, restraints must be definite and reasonable with respect to (1) the time period covered; (2) the territory they are applied to; and (3) the nature of the business activity prohibited. *Farmer, supra.* These three elements are customarily considered separately. *Fuller v. Kolb,* 238 Ga. 602 (1977). In the present suit, there has been no claim made that the two-year limitation included in the restrictive covenant is overbroad. Therefore, I will consider territorial restraints in the covenant first.

The present agreement is unlike most considered by Georgia courts in that it contains no direct reference to any particular territory at all. Instead, the defendant is required only to refrain from "selling or attempting to sell" any customers he served within the two years prior to leaving Bowman. Plaintiff would have the Court imply from this provision a limitation to the Chatham County area, since this is where most of defendant's sales occurred. A similar argument was in fact accepted by the Georgia Supreme Court in *Kirshbaum v. Jones,* 206 Ga. 192 (1949). There the restrictive covenant required that the former employee not "solicit or attempt to solicit the business or patronage of any of the customers of the employer heretofore served by the employee during his term of employment." *Id.* There was no explicit territorial provision in this contract, but the Georgia court found it reasonable because it necessarily limited the defendant to areas he actually served.

However, more recent decisions by the Georgia Supreme Court have taken a different path. Thus, in

Edwin K. Williams & Co.—East v. Padgett, 226 Ga. 613 (1970), the court invalidated a covenant against soliciting accounts served by the plaintiff company because no territory restriction on this restraint was present. See also *Colonial Life & Insurance Co. v. Byrd*, 227 Ga. 198 (1971). Most significantly, in *Fuller, supra*, the Georgia Supreme Court invalidated a restriction on servicing customers of the plaintiff firm in an opinion that directly rejected the logic of *Kirshbaum*. "*Kirshbaum* is disapproved insofar as it intimates that a restrictive covenant in an employment contract is enforceable without an explicit territorial limitation." 238 Ga., at 604.

The logic of the Georgia Supreme Court in requiring an "explicit" territorial limitation even where restraints are based on customer contacts is, of course, open to criticism.[3] However, it is not the function of this Court to approve or disapprove the rulings of the Georgia Supreme Court. In this diversity case, I am, of course, required to apply Georgia law as a Georgia court would when reviewing the same issues. Considering plaintiff's argument in light of *Kirshbaum* and *Fuller*, there can be no doubt that the restrictive covenant here sued under is fatally defective. There is no "explicit" territorial restriction in the covenant. In fact, the only explicit territorial description anywhere in the agreement includes many counties which, according to uncontraverted evidence, were not served by Bowman at all. Thus, even

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[3] "The majority opinion in this case is but another example of 'nit picking' such contracts by this court to the extent that these contracts have been rendered totally inoperative and ineffective. Ten Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of this court." 238 Ga., at 605 (dissenting opinion of Justice Jordan).

where it considered part of the restraining clause, the covenant would still fail as being overbroad and unreasonable in light of plaintiff's proper business interests. *Purcell v. Joyner*, 231 Ga. 85 (1973). See also *Barnett-Walls, Inc. v. TV Ventures, Inc.*, 242 Ga. 816 (1979). Since the present covenant is void in light of the absence of territorial restrictions, it is unnecessary to consider defendant's other arguments.

Conclusion

Under Georgia law, "whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the Court." *Orkin Exterminating Company, Inc. v. Pelfrey*, 237 Ga. 284, 285 (1976). After a careful review of the relevant authorities, I conclude that a Georgia court would refuse enforcement of the present covenant. Therefore, plaintiff's motion for a preliminary injunction is denied. The temporary restraining order now in force is also dissolved.

So Ordered this 9th day of September, 1980.

/s/ [Signature]
Judge, United States District Court
Southern District of Georgia

APPENDIX E

ORDER OF THE DISTRICT COURT SOUTHERN DISTRICT OF GEORGIA ON RECONSIDERATION October 15, 1980

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
Savannah Division

No. CV480-232

[Filed: October 15, 1980]

BARNES GROUP, INC.,
Plaintiff,

v.

JAMES W. HARPER,
Defendant.

ORDER

Before the Court in this diversity case is plaintiff's motion for reconsideration of the Order of this Court of September 9, 1980. In that Order, the Court denied plaintiff's motion for a preliminary restraining order enjoining the defendant Harper from accepting business in violation of a restrictive covenant entered into by the parties. The Court based this determination upon a finding that under Georgia law the covenant was void and unenforceable as repugnant to public policy. *Fuller*

v. Kolb, 238 Ga. 602 (1977), disapproving *Kirshbaum v. Jones,* 206 Ga. 192 (1949). In the present motion, the plaintiff has advanced certain new arguments and evidence. The Court has reviewed these matters carefully. However, this examination reveals no sound basis for disturbing the Court's prior determination. Accordingly, plaintiff's motion for reconsideration will be denied.

Background

This case grows out of an employment contract entered into by the parties in July, 1968. Under the terms of this agreement, the defendant Mr. Harper, was to engage in the selling of plaintiff's line of bolts, fasteners, and other automotive supplies in a sixteen-county area in southeastern Georgia. The contract also included a restrictive covenant whereby Mr. Harper agreed not to sell to any customer he had served for the plaintiff company for a period of two years after leaving the plaintiff's employ.

It is undisputed that Mr. Harper did work as a salesman under this contract for the plaintiff for a period which ended June 11, 1980. Evidence adduced at hearings held in this case August 20, 1980, and August 28, 1980, also indicated that Mr. Harper had developed accounts which brought the plaintiff about $18,000 monthly in gross sales. It was also shown that subsequent to Mr. Harper's departure, Barnes Group sales declined to less than $1,000 per month in the commercial sales division in which Mr. Harper had worked. Mr. Harper also indicated that he was presently engaged in a business which competed substantially with the plaintiff, and that the heavy majority of sales in this new business were to customers he had previously served while employed by the plaintiff.

The Court thus concluded that Mr. Harper was in apparent violation of the restrictive covenant sued under. However, upon examination of this covenant in light of Georgia law and public policy, the Court found it void and unenforceable. This determination was based on two major considerations, both relating to the territorial impact of the restrictive covenant. Plaintiff had argued that, since the covenant applied only to customers Mr. Harper had actually served, it was necessarily limited to a reasonable area, Chatham County, where almost all such sales had occurred. However, the Court found that such an implicit restriction had been specifically rejected by the Georgia Supreme Court in *Fuller, supra. Fuller* directly rejected the argument advanced by the plaintiff by its disapproval of *Kirshbaum*, which had accepted the same argument based on language almost identical to that sued under here. Second, the Court concluded that even were the sixteen-county area described in the initial part of the contract accepted as the explicit territorial restriction required under *Fuller*, the covenant would still be unenforceable because it involved an area greater than was needed to protect plaintiff's interests. This conclusion was based on the fact that neither Mr. Harper nor Barnes Group, Inc. had made commercial sales in most of these counties during the period at issue.

Plaintiff's Arguments For Reconsideration

Plaintiff argues in support of reconsideration that both of the conclusions reached by the Court in its Order demand revision. Plaintiff contends first that the contract in question does contain the explicit territorial limitation which it now acknowledges to be required under Georgia law. Plaintiff refers to the sixteen-county "Territory Description" contained in paragraph 1 of the

agreement. Plaintiff also points to paragraph 2 which provides that the salesman is to "confine his activities to the territory assigned to him and to refrain from soliciting in or accepting orders from other territories." Plaintiff thus contends that the covenant was limited to a specific area and that this area was reasonable in light of the instructions given to Mr. Harper to confine his efforts to those localities exclusively.

In support of this analysis, plaintiff points to several apparent differences between the covenant here at issue and those invalidated by the Georgia Supreme Court based on the absence of territorial restrictions. See *Fuller, supra*; *Colonial Life &c Insurance Co. v. Byrd*, 227 Ga. 198 (1971); *Edwin K. Williams R Co.—East v. Padgett*, 226 Ga. 613 (1970). Plaintiff points out that *Fuller* involved a covenant which covered any client of the employer, not the employee, as is true under the present agreement. Plaintiff also notes that *Colonial Life* involved a contract with no stated territorial limitation at all and that *Padgett*, like *Fuller*, covered any of the employer's clients, not merely the employee's.

Plaintiff suggests that these cases which require an explicit territorial limitation are "inapplicable" to the present facts. Instead, plaintiff argues that this Court should follow a "trend" of recent Georgia cases to be concerned "not so much with the agreement itself as its practical effect on the employee and its notice to him of its obligations." In support of this claim of a new "trend" in Georgia law, plaintiff cites two cases, *Marcoin, Inc. v. Waldron*, 244 Ga. 169 (1979), and *Barry v. Stanco Communications Products*, 243 Ga. 68 (1979). Plaintiff points out that *Marcoin* held valid a territorial limitation of fourteen counties set out in the beginning of the agreements and applied to certain specified activities

by the former employee. Plaintiff cites *Barry* for its holding that a territorial restriction covering the entire State of Georgia may be valid where it is reasonable "in view of the facts and circumstances surrounding the case." 248 Ga. at 70. This decision overruled several prior cases which had invalidated statewide restrictions as *per se* unreasonable. See, e.g., *Orkin Exterminating Co. v. Dewberry*, 204 Ga. 794 (1949).

Finally, in apparent further support of its contention that the sixteen-county area discussed above is appropriate, plaintiff has presented an affidavit from Mr. Chermer, its marketing administrator. This affidavit appears to list the volume of sales made by the plaintiff corporation in fourteen of the counties at issue. This list entirely omits two counties, Effingham and Candler, apparently indicating that no sales at all were made in these localities. It does reflect at least modest sales in most of the remaining counties.

Analysis

Plaintiff now accepts the Court's conclusion that a mere implicit territorial limitation is insufficient under Georgia law even where that implicit limitation appears to be otherwise reasonable. Plaintiff is thus required to demonstrate that the sixteen-county region described in the first paragraph of the contract is *explicitly* incorporated in the restrictive covenant here sued under. Plaintiff claims that this conclusion is warranted even though there is no direct mention of territorial limitation at all in the covenant. In support of this contention, plaintiff argues that the present covenant is analogous to the one approved in *Marcoin*. That case involved a contract which also described an area in its opening paragraph and included a restrictive covenant in the third

paragraph which listed the first of several conditions incorporated in the sales agreement.

The Court is unable to apply the *Marcoin* analysis to the present facts. The covenant here at issue contains no explicit territorial reference at all, as plaintiff has acknowledged. Moreover, the covenant specifically states that "it shall be construed as independent of any other provision in this agreement." Thus, there is no basis whatever for incorporating the territory described in paragraph 1. Quite the opposite, the covenant specifically forbids *any* such reference to other parts of the agreement. This aspect of the covenant is in no way shared by the contract in *Marcoin* which plaintiff relies upon. Thus, there is no basis in that case for concluding that the present covenant would be enforceable under present Georgia law.

Similarly, plaintiff's efforts to distinguish the several Georgia cases which hold that an explicit territorial limitation is required even where the restraint is limited to customers of the employer or the employee do little to advance its position. Plaintiff is certainly correct that these cases involve facts which are more or less different from the ones here at issue. This case is distinguishable from these precedents. However, *Kirshbaum* was similarly distinguishable, and the Georgia Supreme Court nonetheless applied the requirement of explicit territorial limitation. The Georgia court thus clearly demonstrated that such nice distinctions are not to be relied upon to validate covenants which are obviously not favored by the public policy of the state.

Plaintiff's claims concerning a recent "trend" toward less hostile treatment of restrictive covenants must also be rejected. *Marcoin* and *Barry* may indeed signal some shift in judicial opinion, but this shift does not go

nearly far enough to allow validation of the covenant here at issue, even were the sixteen-county area plaintiff argues for accepted as part of the clause. *Marcoin* notes specifically that the covenant there "included 14 counties of the Atlanta area in which Marcoin either had clients presently or had had clients and was actively soliciting clients again." 244 Ga., at 171. Similarly, the state-wide limitation approved in *Barry* involved an employee who "had the right to and did solicit business for Stanco throughout the State of Georgia." 243 Ga., at 70.

Therefore, it is apparent that whatever "trend" these cases may otherwise evince, both hold firmly to the view that territorial restrictions must be limited to an area which the employer does in fact service. In its prior order, this Court noted that Barnes Group had virtually no sales in most of the sixteen-county area. This finding obviously referred to the company's commercial division. This is where Mr. Harper was employed. Commercial customers were the only type served by him and thus the only type covered by the covenant at issue. Mr. Chermer's affidavit must therefore reflect sales by the plaintiff's industrial division which is not the subject of this suit. Such sales are obviously irrelevant to the question at issue here. The covenant could not possibly be said to protect any legitimate interest in these customers because it does not even apply to them. Since the sixteen-county area includes many localities which are not and apparently never were serviced by Barnes' commercial division, it is clearly overbroad under both *Marcoin* and *Barry*. Plaintiff may therefore be correct in seeing a new "trend" in Georgia case law, but this "trend" clearly does not lead to a different result here.

Conclusion

This Court has already noted that Georgia law in this area is subject to criticism. I have also noted that my role here is a limited one. In a diversity action, the federal court is charged only with applying Georgia law as a state court presently would. It has no warrant to make any independent determination of what the law should be. After thorough review of plaintiff's arguments, the Court concludes that they cannot be sustained under present Georgia case decisions. Motion for reconsideration and injunctive relief is therefore denied.

So Ordered this 15th day of October, 1980.

/s/ [Signature]
Judge, United States District Court
Southern District of Georgia

APPENDIX F

SECTIONS THREE AND NINETEEN OF CONTRACT IN *GUFFEY v. SHELNUT & ASSOCIATES*

EMPLOYMENT AGREEMENT

AGREEMENT MADE, January 1, 1979, between SHELNUT & ASSOCIATES, INC., a corporation organized under the laws of the State of Georgia, having its principal office at 825 Russell Street, City of Augusta, County of Richmond, State of Georgia, herein referred to as Company, and GLENN H. GUFFEY, of 3213 Winding Wood Place, City of Martinez, County of Richmond, State of Georgia, herein referred to as Manager.

SECTION THREE

TERRITORY

The territory within which Manager shall operate is North Carolina, and such other territory as approved by Company.

SECTION NINETEEN

RESTRICTIVE COVENANT

For a period of three (3) years after the termination of this Agreement, the Manager will not, directly or indirectly, solicit variable annuity, disability, tax-sheltered annuity, or life insurance sales from those policyholders and school systems that are doing business with the Company at the date of Manager's termination.